ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
	)	
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154
	)	

To: The Commission

COMMENTS OF FOX TELEVISION STATIONS INC. AND FOX BROADCASTING COMPANY

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SUMMARY

Fox Television Stations Inc. ("FTS") and Fox Broadcasting Company ("FBC") (collectively "Fox") agree that it is time to re-evaluate the Commission's attribution policies. But Fox submits that, in conducting such a re-evaluation, the Commission should be focusing on what it can do to increase the broadcast industry's access to capital, rather than seeking to expand attribution of ownership interests in ways that have no beneficial effect on competition and diversity. With broadcasters facing increasing and well-financed multichannel competition from cable television, wireless cable and DBS, the attribution standards should be loosened, not expanded, and program suppliers should not be penalized for investing in licensees, in order to enhance the ability of the broadcast industry to attract capital and compete in the digital marketplace.

The FCC's multiple-ownership and cross-ownership rules are intended to promote the goals of diversity and competition. Attribution standards are merely a mechanism for implementing those rules to achieve those goals. If the current attribution standards are not adversely affecting diversity and competition, there is no need to expand the scope of attribution and thereby make the rules more burdensome. This is especially true where, as here, failing to loosen the attribution standards, not to mention making them stricter, will have an adverse effect on the ability of the broadcast industry to raise capital, and compete in the digital marketplace.

Fox therefore proposes the following:

- All applicants and licensees should be required to identify the individuals and entities that constitute the applicant/licensee control group. Only members of the control group should be deemed to hold attributable interests. All other voting and non-

voting investors should be deemed to hold non-attributable interests, including noninsulated limited partners.

- The insulation criteria for non-attributable limited partners should be deleted.
- LLCs should be treated like corporations.
- The cross-interest policy should be eliminated.

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Fox Television Stations Inc. ("FTS"), and Fox Broadcasting Company ("FBC") (collectively "Fox"), by their attorneys, hereby submit their Comments concerning the Notice of Proposed Rulemaking, released January 12, 1995 in the above-captioned matter (the "Notice"). 1/

I. THERE IS NO SOUND BASIS FOR INCREASING RESTRICTIONS ON BROADCAST TELEVISION OWNERSHIP.

The Commission has declared its intention (MM Docket No. 94-150) to review thoroughly its broadcast media attribution rules, the rules by which it "'define[s] what constitutes a "cognizable interest" for the purpose of applying the

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1/ Fox's Comments are timely filed pursuant to the Commission's Order, DA 95-761 (released April 7, 1995), extending by thirty days the April 17, 1995 deadline established in its Notice of Proposed Rulemaking, FCC 94-324 (released January 12, 1995), for filing comments in the above-captioned proceedings: MM Docket Nos. 94-150, 92-51, and 87-154.

multiple ownership rules to specific situations.'" 2/ Fox agrees that, after a decade of change in the broadcast industry, it is time to reevaluate attribution policies. See id. at ¶¶ 2-3. However, the questions presented in the Notice -- which proposes a number of retrograde regulatory moves, such as making non-voting shares attributable under certain circumstances, restricting the availability of the single majority stockholder exemption, and adding new insulation criteria for limited partnerships -- suggest a disheartening new inclination to *increase* restrictions and thereby *deter* investment in broadcasting. Such proposals swim against the Congressional and recent Commission tide of loosening unnecessary regulations on broadcast ownership.

The FCC's multiple-ownership and cross-ownership rules are intended to promote the goals of diversity and competition. Attribution standards are merely a mechanism for implementing those rules to achieve those goals. If the current attribution standards are not adversely affecting diversity and competition, there is no need to expand the scope of attribution and thereby make the rules more burdensome. This is especially true where, as here, failing to loosen the attribution standards, not to mention making them stricter, will have an adverse effect on the ability of the broadcast industry to raise capital, and compete in the digital marketplace. 3/

2/ Notice of Proposed Rulemaking ("Notice") in MM Docket Nos. 94-150, 92-51, and 87-154, FCC 94-324 at ¶ 1 (released January 12, 1995) (quoting Attribution Order, 97 FCC 2d at 999).

3/ The adverse impact of expanding the scope of attribution would not be satisfactorily ameliorated by simultaneously expanding the number of attributable interests a party can hold. Wholly apart from potential violation of the ownership rules, holding an attributable interest brings with it the status of a "party" to long-form FCC applications and attendant administratively burdensome ownership reporting obligations, regulatory oversight, and investment coordination that many large institutional investors find unacceptable. Venture capital firms, employee retirement funds and other financial services organizations that hold or manage

If a well-functioning video marketplace can be likened to a symphony of diversity and competition, then the prospect of increased regulation jars like a dissonant chord. The Commission's apparent inclination to impose additional restrictions on investment in the broadcast industry disheartens because it runs counter to the Commission's stated goals of diverse ownership and healthy marketplace economic competition, and to recent Commission recognition that the attribution rules may need to be relaxed rather than stiffened in order to encourage investment. As Commissioner Barrett recently stated, the role of government should be "to create a robust and competitive environment in which [existing and emerging broadcast players] can develop more fully and meet their public interest objectives." B&C License Subsidiary L.P., FCC 95-179 (released April 27, 1995) (separate statement of Commissioner Andrew C. Barrett).

In initiating MM Docket No. 92-51 (the "Capital Formation Proceeding"), the Commission stated:

> We initiate this proceeding to seek comment on possible means for reducing unnecessary regulatory constraints on investment in the broadcast industry. We believe this action is particularly appropriate now, since the availability of capital has recently become a matter of increasing concern to the industry. We also believe that this action is

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large portfolios have been an increasing source of much-needed capital for broadcasters. Many such firms, with scores of officers, directors, subsidiaries and affiliated financial entities under common control, simply will not accept the burden of continually having to survey all of these individuals and entities to determine what media interests they hold in order to monitor compliance with the FCC's ownership rules, to prepare FCC ownership reports, and to answer the legal qualifications questions on FCC Forms 301, 314, and 315. Many of these firms will simply choose not to make a broadcast investment if that investment will be attributable. Broadcasting competes with other industries for a finite amount of capital, and unnecessary regulatory burdens will discourage investment and limit broadcasters' ability to compete and serve the public interest.

necessary to ameliorate the difficulties that new entrants to this industry, including, in particular, minorities and women, have experienced in obtaining adequate financial backing and in successfully breaking into broadcast ownership. Furthermore, the capital demands of the broadcast industry for all participants can only be expected to increase in the near future, as new technologies such as Digital Audio Broadcasting and Advanced Television are implemented. The availability of capital for such enterprises is likely to be a significant determinant of whether U.S. preeminence in the field of broadcasting will be preserved.

The broadcasting industry is a cornerstone of American commerce and, therefore, has substantial effects on other parts of the U.S. economy. In addition to the approximately $35 billion in revenues the industry generates directly each year, investment in the commercial broadcasting industry results in production in a host of other industries. To cite one example, the U.S. television broadcasting system has resulted in a vibrant television programming production industry. These related industries are significant not only domestically, but also internationally. For example, in the international economic arena, the U.S. enjoys a significant comparative advantage over foreign competitors with respect to television production exports. In 1989, U.S. television production export totaled $1,696 billion, or roughly 71% of the world television production export.

Given the significance of the domestic broadcasting industry to the economy, it is vitally important that our regulatory programs be as minimally burdensome on investment in the industry as possible, consistent with our statutory mandate. Therefore, in this proceeding we seek comment on several proposals for changes in the Commission's Rules and policies which could increase and facilitate the availability of capital for investments in the broadcasting industry. [Notice of Proposed Rule Making and Notice of Inquiry in

MM Docket No. 92-51, 7 FCC Rcd 2654, ¶¶ 1-3 (1992).]

Those words are as true today as when written in 1992. Yet, while the Notice states that the record from the Capital Formation Proceeding will be incorporated and considered in this proceeding, the Notice unfortunately pays inadequate attention to the significant capital formation problems that led the Commission to initiate Docket 92-51.

Fox is addressing the issues in this proceeding from the perspective of a television licensee and a television network. With increasing competition from such growing competitors as cable television, wireless cable, and DBS, Fox affiliates and those of the other five English-language national broadcast television networks must be able to grow and attract capital, especially now at the dawn of the digital age.

Fox encourages the Commission to recognize the dissonance that further restrictions would create. It is indeed time to reevaluate the attribution rules. But why hold investors accountable for interests they have in broadcast entities, if those interests do not confer any control? And why attempt to expand regulatory ownership restrictions by micromanaging varying degrees of amorphous "influence?" The Commission has the opportunity to act boldly. Rather than retreat into a outmoded and unjustifiable regime of restrictions, the Commission should cast off unnecessary limits and open the broadcasting field to invigorated investment activity, expanded business opportunity, and increased competition among increasingly diverse players.

Fox submits that all applicants and licensees should be required to identify the individuals and entities that constitute the applicant/licensee control group. Only members of the control group should be deemed to have an

attributable interest in the licensee 4/. All other voting and non-voting investors should be deemed to hold non-attributable interests, including but not limited to noninsulated limited partners. 5/

There is no justification for intensifying the restrictions on investment in broadcasting. The Commission's Notice announces its desire to "identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under the multiple ownership rules." Id. at ¶ 4. But making the attribution rules more inclusive would be a misguided response to the economic and technological transformations of the last ten years. The facts offer no sound basis for increasing current restrictions on ownership of broadcast interests. The Commission acknowledges its obligation to "tailor the attribution rules to permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry." Id. at ¶ 5 and n.15 (citing Attribution Order, 97 FCC2d at 1020.) (emphasis added). But attempting to triangulate such an indefinite quantity from benchmarks and other indicators would be an unavoidably arbitrary exercise that cannot avoid "unduly restricting" access to investment capital.

The Commission has invited commenters "to propose alternative analytical frameworks for establishing the specific interests that should be deemed cognizable under [the] various multiple ownership rules." Id. at ¶ 12. Fox submits

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4/ Fox does not propose any change in the current standards for attribution of officers and directors.

5/ Fox also submits that nonattributable equity investments should no longer be subject to the cross-interest policy. The imprecision of that policy serves only to create unnecessarily a potential cloud over nonattributable investments. In fact, it is time to do away with the policy entirely.

that, rather than casting the attribution net more widely, to capture all but the most "minimal risk" of influence, the Commission should adopt a circumspect approach that resonates with current circumstances. A more suitable regulatory policy would recognize the competitive industry that broadcasting has become and *would eliminate the attribution of noncontrolling interests altogether.*

Unless the Commission can clearly identify harmful conduct that needs to be remedied by increased regulation of attributable interests, and can rationally predict that the regulations will alleviate those harms, the Commission should refrain from increasing restrictions on broadcast ownership. An agency has a significant burden to carry before it may extend old or impose new restrictions on regulated businesses. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) (rules must be based on a rational prediction that they will remedy an identified harm); NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982) (Commission should not continue to regulate unless it can clearly identify the harm to be remedied.) FTS submits that any attempt to justify a stricter attribution regime for broadcasting will fail.

Indeed, for a highly competitive industry like broadcasting, the Commission should proceed with redoubled caution in contemplating any increase in regulation. It is fair to state that there is presently more competition and more diversity in broadcasting than ever before. The competition that now animates broadcasting already acts as a safeguard against many possible problems. It is not clear from the Notice what other harms exist that would require the drastic "remedy" of tightened restrictions on attributable interests. Reregulating broadcasting in the interest of "consistency" is not an appropriate goal, if increased regulation creates problems that outpace any alleged benefits.

In addition, a grave danger lies in enveloping broadcasters in regulations that artificially restrict their access to capital -- the danger that

broadcasters will become too ensnared to effectively compete with cable, telecommunications companies, and other current and potential competitors. The video marketplace has undergone dramatic change since the Commission formulated its attribution policies. Today, more than ever, the broadcast industry must meet the challenges raised by an expanding field of rivals. The three established networks, along with newer entrants like Fox, face stiff competition from a heavily concentrated cable industry. The telecommunications giants loom on the horizon, as the regulatory environment welcomes their anticipated contributions to both competition and technological advancement. Multi-channel distribution systems, such as DBS and MMDS 6/, are gaining speed. Broadcasters must enhance their competitiveness to keep up with the relentless pace of technological, economic, and regulatory change. To hamstring broadcasters at this critical juncture would be irrational and counterproductive, if the Commission is seeking to maximize the diversity of views and to foster unbridled competition. In light of the competitive realities facing broadcasters today, there is no longer any reason to attribute ownership interests that fall short of control.

II. NON-CONTROLLING "INFLUENCE" SHOULD NOT BE REGULATED.

The Commission historically has conceded that it is difficult, if not impossible, to identify and quantify the level of "influence" that warrants limitation under the multiple ownership rules. See, e.g., Attribution Order, 97 FCC 2d at 1003 (acknowledging that measures of influence are "imprecise" and "inexact" and

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6/ This morning's Washington Post carried a lead story in its Business section on Bell Atlantic's intent to offer more than 100 channels of video programming via wireless cable to homes in the Washington, D.C. area by the end of 1996. There can be no doubt that the competition facing broadcasters, who typically provide but a single channel of video programming in a market, is real, is growing and is well financed.

that the relationship between "cognizable ownership and actual influence" is "at best indirect"). And so, in the absence of a controlling shareholder or group, the accumulation of a certain percentage of voting stock is deemed to represent sufficient potential influence for attribution purposes. The 5% and 10% benchmarks, like their 1% and 3% predecessors, attempt to quantify the potential to "influence" corporate affairs and thus function as surrogates for a dominant shareholder or control group.

While it is possible to impose arbitrary limits on certain levels of investment or involvement that seem somehow significant but do not constitute actual control, it is difficult to show that these markers delineate anything real. The Commission expresses interest in casting its attribution net more widely, to make sure that no untoward arrangement evades regulation, but it fails to show that the public interest is presently being harmed in ways that justify this expansion. The current restrictions on ownership presently have a significant anticompetitive effect. More restrictions would simply increase restraints on capital and competition, without creating any identifiable benefits.

In fact, the arbitrary and extreme interpretation of "influence" already produces untenable results. For example, in order to treat an investment as non-attributable in a recent transaction between FTS and New World Communications Group, Inc. ("New World"), the Bureau staff informally required the deletion of a provision in the New World investment agreement that gave FTS the right to attend and observe board meetings. The staff justified its position on the ground that this "attend-and-observe" provision, together with FTS's non-controlling investment, allegedly conferred undue influence on Fox, even though the terms of the provision expressly prohibited FTS from participating in the meetings in any way, and even though New World has a single-majority stockholder, the Andrews Group. It is difficult to imagine how a right of observation could even generally be

considered to constitute undue influence on corporate decisionmaking. And anyone familiar with the Andrews Group and its Chairman, Ronald Perelman, would know that Fox has no influence in or over the decision-making of New World. The staff's position on the board observer issue was is characteristic of the pitfalls of targeting degrees of potential "influence" rather than control.

The fact is that a significant amount of actual or potential influence inheres in all of a licensee's important economic relationships -- with networks, with other program suppliers, with program producers, with advertisers, with lenders, and with regulators, to name but a few. For example, national sales representatives exert significant influence over station sales and programming practices, and typically set up meetings with station management shortly before the NATPE convention to advise about what syndicated programs to buy. Such advice typically carries considerable weight. But these kinds of influence do not create attributable interests. Attributable interests, except for officers and directors, are generally limited to certain kinds and degrees of equity investment. Yet the Commission has failed to identify a sufficient rationale for treating non-controlling equity interests more restrictively than other kinds of business relationships.

If the Commission were truly to insist on being consistent in defining attribution in terms of influence, most network affiliation agreements, and syndication contracts requiring in-pattern clearance, would give rise to attributable interests. In addition, restrictive covenants regarding financing and consulting or management agreements might also create attributable interests. The Commission can find in its own files numerous loan agreements between stations and major lenders which limit a licensee's discretion over a variety of operational issues such as capital and programming, expenditures, debt-to-equity ratios, loss of network affiliation, and sometimes even selection of new CEOs. Such provisions can give lenders substantial "influence" over station operations, especially when the

borrower is in default. Clearly, the Commission does not intend to extend its rules to reach these kinds of influence. 7/ And yet there is no reasonable basis for concluding that the degree of potential influence that results from non-controlling equity investments is likely to be greater than that which results from these kinds of relationships.

Fox submits that the time has come for the Commission to scrap the concept of attribution based on "influence" and instead to base attribution solely on "control." In its Notice, the Commission acknowledges the need for any new rules to be "clear" to those regulated, to "provide reasonable certainty and predictability to allow transactions to be planned, ensure ease of processing, and provide for the reporting" of all necessary information. Id. at ¶ 5. In other words, the Commission has affirmed the need for some kind of bright-line test, to avoid the delay and uncertainty of a completely ad hoc system. The Commission should recognize that control, and not some vaguely defined degree of influence, is the appropriate benchmark. The Commission has had sixty years of experience defining and determining control under Section 310(d). Control is the only kind of bright-line that makes sense in today's competitive broadcasting environment.

7/ Banks and other lenders will not lend without numerous affirmative and negative covenants that give them the same degree of influence over broadcast borrowers as they have over other borrowers. If these kinds of covenants and the resulting non-controlling influence were to render the bank's interest attributable, most banks simply will not make the loan.

III. WHERE THERE IS A *DE JURE* OR *DE FACTO* CONTROLLING SHAREHOLDER OR CONTROL GROUP, IT MAKES NO SENSE TO LIMIT OTHER EQUITY- OR DEBT-HOLDINGS ON THE BASIS OF POTENTIAL OR NON-CONTROLLING "INFLUENCE."

Consistent with the proposal outlined above, the Commission should not revise its policy on companies with single majority shareholders. See Notice at ¶ 51. The rationale underlying the adoption of the single majority shareholder exemption remains valid and has broad currency today. In 1984, the Commission determined that minority stockholders cannot dominate a licensee where there is a single majority stockholder, and so their interests need not be attributable. The same rationale operates wherever an individual or a group has *de jure* or *de facto* control: while other shareholders may be able to exert some "influence," that influence cannot rise to the level of control as long as the majority shareholder or control group can affirmatively direct corporate affairs. There is no need to restrict the availability of the single majority shareholder exemption; on the contrary, Fox proposes that this "exemption" be expanded into a regulatory framework that bases attribution on control.

It is equally clear that contractual rights obtained in connection with a station's programming or debt financing should not implicate the multiple ownership rules if they do not include aspects of control. Such rights or holdings spring from the controlling parties' exercise of discretion. The ability of a minority investor or contracting party to "influence" the operations of a station should not matter if another shareholder or group of shareholders has the power of ultimate control.

The Commission concedes that, in the single majority shareholder context, it is concerned only with "the potential" to influence the licensee. Notice at ¶ 51. However, by definition, "potential" influence does not amount to influence,

much less control. Indeed, there are myriad sources of "potential" influence -- advertisers, viewers, bankers, regulators -- none of which should qualify as having an attributable interest unless it has become the locus of licensee control.

A prime example of the irrelevance of financing agreements and program supply contracts to the control of an entity with a single majority stockholder is the relationship between FTS and New World. FTS has purchased convertible non-voting preferred stock in New World. FTS does not presently have any power or rights, and has no intention, to elect any director of New World or its affiliates, to select any officer or employee of New World of any of its affiliates, to participate in the decision-making process of New World or any of its affiliates, or to be involved in the day-to-day operations or management of any New World station. The only other involvement, arrangements or understandings between the companies and their affiliates related to the offering of FBC network programming to New World stations pursuant to affiliation agreements between the stations and FBC, and understandings whereby New World would produce a limited amount of syndicated programming to be broadcast by the FTS owned and operated stations and would produce pilots and made-for-television movies for acquisition by the FBC network. The parties also intend to work together to develop two hours of syndicated daytime programming.

FTS' interest in New World is not attributable under the Commission's current rules. See Ownership Attribution, 97 FCC 2d 997 (1984). There is no reason to change the rules to make that interest attributable. FTS has no extraordinary leverage to dominate the decisions of New World. The Commission has averred its intent to be guided by the effect that the "financial claims" and "associated voting or contractual rights" of investors have on the conduct of broadcasting companies. Notice at ¶ 12. But there is no reasonable way to measure such claims or rights, which will vary from case to case, and attempting to base

attribution on such rights would be complicated and unnecessary. The relationship between FTS and New World is a case study of how a company actively run by a single majority stockholder has the power to reject perceived influence by investors with which it does business, and that such investors should not be attributed with ownership of such a company's stations.

FBC is not the only, or even the first, national network to perceive the need to make non-attributable investments in its affiliates. When NBC sold WKYC-TV in Cleveland to Multimedia Broadcasting Co. ("Multimedia") in 1991, it retained a 49 percent equity interest, and continued to provide NBC network programming to the station under a long term programming agreement. The Commission there found that, notwithstanding NBC's equity interest and network program supplier relationship, Multimedia retained control and that NBC's interest would and should be non-attributable. Letter from Barbara Kreisman to Howard Monderer, et al., dated December 24, 1990, rev. denied, 6 FCC Rcd 4882 (1991). There is no reason to change the rules in order to change that determination either. More recently, ABC has made a substantial non-attributable equity investment in Young Broadcasting, Inc. and CBS has made a substantial commitment for a non-attributable equity investment in a joint venture with Westinghouse. Such arrangements promote the competitiveness of broadcasters and must not be impeded if over-the-air broadcasting is to survive and flourish in the dynamic multi-channel television marketplace.

IV. SIMILARLY, BECAUSE *NON-VOTING* SHAREHOLDERS BY DEFINITION CANNOT CONTROL CORPORATE AFFAIRS, THERE IS NO BASIS FOR DEEMING THEIR INTERESTS ATTRIBUTABLE.

In its Notice, the Commission evinces a tendency to project control onto significant investors who have chosen to forego commensurate voting rights.

The Commission is contemplating placing restrictions on non-voting equity holders who also have some voting stock or contractual rights, and yet equity without majority votes cannot exercise control. See ¶¶ 52-54. There is no adequate basis for the Commission's proposal to impose an attribution benchmark on non-voting stockholdings equal to that applied to "passive investors," or to any other investors. There is absolutely no difference between owners of non-voting equity and those who hold warrants or convertible debt. And there is no reason to treat such interests differently or to treat any of them as attributable.

The Commission supports its consideration of expanding the scope of attribution to non-voting equity interests by stating that "equity holders govern or control the management of the firm". Notice at ¶ 17. But that is not necessarily accurate. In fact, it is the control group of an entity that governs and controls, and only those investors who are part of the control group should be regulated.

As in the single majority shareholder context, to the extent non-voting shareholders or limited partners seek to exert influence through contractual relationships, they should not be attributable unless linked to control mechanisms. Again, such rights or holdings are the result of the exercise of discretion by the licensee's control group and do not even presumptively indicate an abdication of control. Investment by a network such as FBC in its affiliates can affirmatively strengthen UHF stations and serve the public interest. Indeed, the experience of FBC suggests that network investment in affiliates may be the only way that it and such newer networks as UPN and WB can strengthen weak affiliates to the point where they can compete effectively with their established network competitors. Expanding the scope of attribution to cover such relationships will necessarily jeopardize the development and growth of the new networks.

Not only does the FCC's apparent suspicion of non-voting equity and contractual rights defy logic, it also hurts minority entrepreneurs. As the

Commission has acknowledged, ownership opportunities for minorities depend in large measure on their access to capital. See Notice at ¶ 13. The Commission should recognize that non-attributable investment vehicles have helped two minority entities to be capitalized. In both the recent Tribune/Qwest and the Fox/Blackstar transactions, companies backed minority-owned enterprises without claiming the amount of control that would ordinarily accompany such investment. The success of such ventures can reverberate throughout the industry, encouraging others to pursue similar transactions which will increase their profits and advance the goal of diversity simultaneously. But such transactions are not likely to take place unless investors can make substantial, non-attributable investments which do not unduly restrict their ability to conduct business with the minority-controlled entities in which they are investing. The Commission must therefore avoid creating such restrictions through an unnecessary expansion of the attribution standards.

Non-voting investments in stations by networks and program syndicators do not give such networks and syndicators the ability to control their affiliates. In this respect, the relationship between an investor network or program syndicator and an affiliate station is indistinguishable from an affiliation relationship between any network or syndicator and station. In neither relationship does the network or syndicator exert impermissible influence over the affiliated station. The managers of a partnership or LLC licensee enter into affiliation and program contracts at their discretion. They retain ultimate control and, of course, have the option of contracting with other parties.

Prohibiting networks from investing in their affiliates, as the proposed changes would effectively do by expanding the definition of attributable interests, would ignore the realities of the broadcasting business. It would also restrict the flow of capital into minority enterprises like Blackstar and Qwest while handicapping broadcast networks vis-à-vis their cable competitors. And it would

injure and prejudice networks such as Fox which have developed plans based on their ability under the present rules to make non-attributable investments in their affiliates.

As a matter of policy, the Commission should encourage programmers to invest in broadcasters, rather than preclude such investment. Fruitful analogies can be drawn between interests in broadcasting and financial interests in syndication and also between broadcasting and cable. In both the syndication and cable contexts, investment by programmers in their distribution systems has produced substantial benefits. The Commission opened the door to investment by broadcast networks in producers when it concluded that "impediments to network purchase of financial interest and syndication rights have negative effects on the smallest, least established producers." Fin/Syn Second Report and Order at ¶ 51 (released May 7, 1993). Developments in both syndication and cable exemplify the real competitive utility of permitting programmers to invest in their distribution systems. Both also show that benefits far outweigh the theoretical harms.

V. ARMS-LENGTH RELATIONSHIPS BETWEEN LIMITED PARTNERSHIP OR LLC LICENSEES AND PROGRAM SUPPLIERS DO NOT GIVE RISE TO IMPERMISSIBLE "INFLUENCE" WARRANTING RESTRICTION UNDER THE MULTIPLE OWNERSHIP RULES.

As the Commission stated in the Capital Formation Proceeding (see supra at 3-4), the attribution rules need to be tailored in ways that promote investment, especially for, but not limited to, minority-controlled firms. In this regard, the Commission must take into consideration the fact that, in today's competitive environment, broadcast licensees and investors must be allowed to benefit from the tax advantages of limited partnerships and limited liability companies ("LLCs") without being subjected to more onerous regulation than corporate licensees.

Unlike limited partnerships and LLC's, corporate structures typically result in double taxation to the investor when a station is sold and the company liquidated. If a corporate structure must be used to avoid attribution for investors, projected after-tax rates of return are reduced dramatically making the attraction of capital investment much more difficult. It is therefore essential that the attribution standards for limited partnerships and LLC's be comparable to those for corporations, and that non-voting interests in all (and indeed all noncontrolling interests) be non-attributable.

In order to achieve this parity of treatment, Fox submits that the insulation requirements for non-attribution of limited partnership interests should be deleted. They impede capital formation without any demonstrable benefit to the public interest. Moreover they are virtually impossible for the Commission to enforce. The insulation criteria were designed to prohibit a limited partner's ability to influence or control the partnership. But as Fox has argued above, attribution should be based on control, not influence, and limited partners, like other non-attributable investors, should not have to be totally passive to avoid attribution of ownership. Thus insulation criteria are not needed to prohibit influence, because influence should not be prohibited. And insulation criteria are not needed to prohibit unauthorized control, because the requirements of Section 310(d) are adequate to protect against sham structures or other unauthorized control by limited partners.

The Commission has also tentatively proposed to treat LLCs as it now treats limited partnerships, by conditioning non-attribution on an applicant's certification that the member is "not materially involved, directly or indirectly, in the management or operation of [its] media-related activities." Notice at ¶ 69. The Commission observed that its plan would "result in attributing all investors that may provide programming or other services to the LLC "even though "recent

experience suggests that such arrangements have been central to proposals that might significantly advance minority ownership of broadcast facilities." Id.

Fox submits that the Commission has suggested the possibility of granting exceptions "on a case-by-case basis, where doing so would advance our policy of enhancing opportunities for broadcast station ownership by minorities." Id. The case-by-case examination of proposals for entitlement to such an exception would be inadequate. The public interest would be better served by the Commission's acceptance of the LLC form, recognizing its distinct properties and preserving its advantages. The Commission can encourage more capitalization if the LLC is not relegated to haphazard, case-by-case decisionmaking but is instead accorded appropriate treatment as a legitimate business entity. Moreover, a strict insulation requirement makes no sense in *either* the partnership or the LLC context. There is no need to preclude program supply activity by non-attributable investors when both types of entities provide ways to ensure that such investors do not exert control.

As the Commission is aware, an LLC is a hybrid entity which combines the benefits of partnership tax treatment with the limited liability aspects of a corporation. LLCs are now authorized under the laws of more than 40 states. Parties may choose to structure an LLC according to either a corporation or a partnership model. Pursuant to the LLC's "operating agreement" -- which sets out all the rules or agreements regarding the rights and obligations of the LLC's "members" (equity owners), the LLC's management, the conduct of its business affairs, the distribution and allocation of its profits and losses, or any other matter -- an LLC may adopt one of the two alternative governing structures. In a "member form" LLC, the members manage the company. In a "manager form" LLC, the company is run by certain elected managers, who need not be members of the LLC.

Under this alternative, certain members may be expressly barred from participating in the control or management of the company.

Fox submits that all forms of LLC's should be treated like corporations under the attribution rules. As Fox has proposed above, only investors which are part of the control group of the LLC, regardless of form, should be deemed to hold attributable interests. All other investors should be deemed non-attributable.

Properly structured, an LLC is comparable to a corporation that issues voting and non-voting stock. As in the corporate context, an LLC's structural elements may clearly differentiate between voting and non-voting ownership interests, while satisfying the IRS's requirements to qualify for favorable tax treatment. For example, the operating agreement may specify the following: (1) voting rights may be restricted to certain members; (2) voting members may elect a board of managers, which, like a corporate board of directors, is solely responsible for the selection of the LLC's officers; (3) officers with titles and duties comparable to those of corporate officers are responsible for the day-to-day management of the LLC; (4) by definition, non-voting members may be passive investors who have no participation in the control or management of the company. 8/ Because they do not vote for managers who, in turn, select the officers responsible for day-to-day operations, non-voting LLC members are presumptively incapable of controlling company affairs and thus are analogous to non-voting shareholders in a corporation.

If the Commission does not treat all LLC's like corporations, and if the Commission does not delete the insulation requirements for non-attributable limited partners, Fox submits, in the alternative, that at least the manager form

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8/ The Commission could retain discretion to require LLCs to file their operating agreements on a case-by-case basis. See Notice at ¶ 72.

LLC should be treated as a corporation. Such an LLC's non-voting members should be exempt from attribution upon certification 9/ by an officer of the LLC of certain facts showing that the non-voting members cannot participate in management. 10/

The LLC structure can be a powerful tool in attracting new capital to the broadcasting industry, particularly for groups such as women and minorities that historically have been underrepresented in broadcast station ownership. Many more investors would emerge if they knew that their interests in LLC licensee entities would be non-attributable under the FCC's ownership rules. With a minority individual or group at the helm, LLCs can measurably increase diversity without the risk of domination by non-minority investors, who will lack all ability to control under the LLCs' operating agreements. The Commission should not turn its

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9/ An example of such a certification is the following:

> 1. Voting members have the exclusive right and power to elect the board of managers.
>
> 2. The board of managers has the exclusive right and power to select the officers who are responsible for the day-to-day management and operations of the company.
>
> 3. Non-voting members have no rights or powers to influence or control the day-to-day management or operations of the company or to participate in any way in the election of its managers or officers.

10/ Under this alternative, if an LLC adopted a member form structure that does not provide for a board of managers or officers, all members would be involved in the company's decisions and have the power and/or responsibility to participate in its day-to-day management and operations. For attribution purposes, such a member form LLC could be treated as a partnership. A member form LLC with only voting members could be treated as a general partnership, and all of the members' interests could be deemed to be attributable. If a member form LLC also includes non-voting members, then such non-voting members of the member-form LLC could be exempt from attribution.